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## THE SHAREHOLDERS' ROLE IN ANTITRUST ENFORCEMENT

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The litigation currently arising from the antitrust prosecutions in the heavy electrical equipment industry<sup>1</sup> dramatizes the question whether corporate shareholders can and should play a more important role in the enforcement of the federal antitrust laws. More specifically, the problem is whether shareholders' derivative actions<sup>2</sup> are available as a means of preventing a course of corporate conduct which runs a serious risk of incurring antitrust penalties or, if the conduct has already resulted in financial loss to the corporation, of recovering from the responsible officers and directors. Another aspect of the problem

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<sup>1</sup> The extent of the civil litigation which has followed the heavy electrical prosecutions may be illustrated by reports from law offices and corporate counsel. Thus one of the larger electrical firms reports that almost 150 complaints have been filed against it; and a smaller firm reports approximately fifty complaints by a total of twenty plaintiffs. A New York law office which has kept records of the complaints filed against all defendants reports that a total of between 130 and 200 complaints have been filed in the various United States district courts. One possible explanation for the discrepancy between the figures supplied by individual firms and those compiled by this office is that many of the complaints name more than one party defendant. It is probably too early for any shareholders' derivative suits growing out of the prosecutions to have reached the courts, and the same New York law office reports that it has not yet discovered any complaints of this nature.

<sup>2</sup> "Shareholders' derivative suit" is too ungainly a phrase to repeat on every occasion when meaning requires reference. "Shareholders' suit" more suitably describes an individual or class action pressing claims other than the corporation's. "Derivative suit," although properly a broader, generic term, presents little risk of confusion, and will be used here as a slightly more convenient substitute.

is whether shareholders can force a reluctant management to avail itself of such remedies as treble damage suits and injunctions when the company has suffered or is threatened with antitrust injuries.

Certainly some of the objectionable characteristics of derivative suits<sup>3</sup> may be accentuated in the antitrust context.<sup>4</sup> On the other hand, both Congress and the courts have repeatedly assigned high priority to the objectives of the antitrust laws.<sup>5</sup> Inducements to their enforcement through private actions have been created which have few, if any, parallels elsewhere in the legal system. In any event, the fact is that during the last decade the derivative suit has steadily extended its importance in the antitrust field. The cases, although as yet few in number, are plentiful enough to permit analysis of possible patterns of development.<sup>6</sup>

<sup>3</sup> To a great many lawyers, this class of suit is an anathema, in part because the nature of the action lends itself readily to the abuses sufficiently summed up in the term "strike suit"; in part also, perhaps, because even when legitimately used, derivative suits represent an intrusion into what management usually regards as its exclusive domain of decision and policymaking—a domain into which outsiders, even those to whom ultimate responsibility lies, are admitted only very unwillingly. See, e.g., WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (1944); Ballantine, *Abuses of Shareholders Derivative Suits*, 37 CALIF. L. REV. 399 (1949).

<sup>4</sup> See, e.g., p. 156 *infra*.

<sup>5</sup> The rhetorical heights to which the merits of competition in general and the antitrust laws in particular often inspire legislators and courts need hardly be cited to chapter and verse. More persuasive are the statements found in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1-3, 317-18, 378-85 (1955).

<sup>6</sup> We are here concerned only with shareholders' *derivative* suits. Apparently the nature of an antitrust injury is such that a shareholder cannot successfully show the special injury required to establish standing to sue individually or representatively for shareholders as a class. See *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910). See also Comment, 5 STAN. L. REV. 480, 481-84 (1953).

A derivative suit gives rise to two independent judicial inquiries. Before the substantive cause of action may be decided on its merits, the court must find that the failure of the directors to press the corporation's claim for relief is indefensible. In the cases to be discussed, the substantive cause of action is either an alleged violation of the federal antitrust laws, a breach of the directors' duty to the corporation, or both. Thus a director who participates in an antitrust violation which injures his corporation may face liability on three analytically separate bases: (1) for violation of statutory law which provides for penalty damages to any injured person, including the complaining corporation; (2) for breach of his common-law duty to the corporation not to injure it through faithless acts; and (3) for breach of his common-law duty to the corporation to seek appropriate legal relief—including relief from acts in which he himself may have participated. In practice, the distinction between the first and second bases has been made primarily for purposes of consideration of jurisdiction, that is, whether a state court entertain a shareholders' derivative suit in which a federal antitrust violation is involved. See pp. 146-47 *infra*. By itself, the third basis seldom, if ever, supports liability, perhaps because the damages hurdle is even more difficult than showing a breach of duty. However, recovery on this basis is not inconceivable in, say, a case in which an open-and-shut treble damages action against outsiders has fraudulently or negligently been allowed to become barred by a statute of limitations. In fact, the penalty normally imposed for breach of the duty to bring suit is that the decision and control of the suit are taken out of the hands of management and given to the complaining shareholders. For a more complete discussion of these matters, see LATTIN, CORPORATIONS 349-52 (1959); Note, 66 HARV. L. REV. 342 (1952).

## I. ACTIONS TO ENFORCE THE COMPANY'S ANTITRUST REMEDIES

The first type of case to be considered is that in which a shareholder alleges that an injury has been or is being visited upon his corporation, and that the injury stems from a violation of the antitrust laws. The essential feature is that, although the corporation itself is not being made to violate the antitrust laws, it is not defending itself against, or seeking reparations for, injury at the hands of those who are. This forbearance is usually motivated by some implication of the controlling directors or shareholders in the activities of the prospective defendant. In a much smaller number of cases, the antitrust claim is not pressed because the directors or shareholders, though not implicated, have made a decision against doing so which the complaining shareholder believes to be capricious.

*A. Procedural Obstacles*

Where the remedy sought by the shareholder in this type of suit was treble damages, for thirty-five years prior to 1953 he found himself automatically out of court. In *Fleitmann v. Welsbach St. Lighting Co.*,<sup>7</sup> a shareholder alleged that defendants had conspired in violation of the antitrust laws to acquire control of the corporation and destroy it as a competitor, and had done so. The injury having been completed, treble damages was the appropriate remedy. But the Supreme Court held that the claim could not be made.<sup>8</sup> A shareholders' derivative suit is an equitable form of action; to permit it in a suit for damages would destroy defendant's right to a jury trial on that issue, a result which Mr. Justice Holmes said the Sherman Act did not seek to bring about.<sup>9</sup>

Shortly thereafter, in *United Copper Sec. Co. v. Amalgamated Copper Co.*,<sup>10</sup> the Court affirmed a Second Circuit decision, on facts that are not well reported, that no derivative action would lie without allegations of both a breach of trust by the directors or control of the directors by the defendants and a demand on the shareholders.<sup>11</sup> In addition, Mr. Justice Brandeis noted that even if these requisites had been satisfied, a shareholder's derivative suit, being a purely equitable remedy, could not be brought at law.<sup>12</sup>

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<sup>7</sup> 240 U.S. 27 (1916).

<sup>8</sup> *Id.* at 29.

<sup>9</sup> *Ibid.*

<sup>10</sup> 244 U.S. 261 (1917).

<sup>11</sup> *Id.* at 263-64. On this point the decision is still today a leading one. See *Swanson v. Traer*, 249 F.2d 854, 855-56 (7th Cir. 1957).

<sup>12</sup> 244 U.S. at 264.

There being no other alternatives, federal courts could not entertain derivative antitrust suits in which a claim for damages was made. Although Holmes' logic did not exclude the possibility of equitable remedies, the applicable provision of the Sherman Act<sup>13</sup> was interpreted to limit to the federal government the right to sue for injunctive relief.<sup>14</sup> After 1914, however, section 16 of the Clayton Act<sup>15</sup> broadened the availability of injunctions. Although this provision was narrowly construed as applied to a shareholder seeking to enjoin the allegedly illegal actions of his own corporation,<sup>16</sup> apparently, it has always been available to a shareholder suing derivatively in a federal court to obtain relief for an injury emanating outside the corporation.<sup>17</sup> The shareholder was not, however, able to obtain damages—even untrebled—as an incidental remedy in a suit for an injunction.<sup>18</sup>

But the hybrid nature of derivative antitrust suits means that the statutory jurisdiction of the federal courts is not the only basis on which such facts may be brought before a court. So far as traditional doctrines are concerned, state courts can entertain derivative suits for breach of the common-law duty of a director to his corporation based on facts which might incidentally constitute an antitrust violation.<sup>19</sup> If an injunction is sought, however, it may prove fatal to make specific antitrust allegations, for the Supreme Court early held that section 16 provided an exclusive remedy and foreclosed state action.<sup>20</sup> But even an antitrust allegation, although perhaps in some sense improper,<sup>21</sup> does not necessarily defeat the jurisdiction of a state court to consider a claim for ordinary damages or equitable remedies other than an in-

<sup>13</sup> 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

<sup>14</sup> *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904); *Corey v. Independent Ice Co.*, 207 Fed. 459 (D. Mass. 1913).

<sup>15</sup> 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958): "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

<sup>16</sup> See *Continental Sec. Co. v. Michigan Cent. Ry.*, 16 F.2d 378, 380 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927). See also *Meyer v. Kansas City So. Ry.*, 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936); *General Inv. Co. v. New York Cent. R.R.*, 23 F.2d 822 (6th Cir.), *cert. denied*, 277 U.S. 588 (1928).

<sup>17</sup> See *General Inv. Co. v. Lake Shore & Mich. So. Ry.*, 260 U.S. 261, 286-87 (1922). See also *General Inv. Co. v. New York Cent. R.R.*, 271 U.S. 228 (1926); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590 (1921).

<sup>18</sup> *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426 (2d Cir. 1928).

<sup>19</sup> *Clayton v. Farish*, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947); see pp. 166-67 *infra*. See also *General Inv. Co. v. Lake Shore & Mich. So. Ry.*, 260 U.S. 261 (1922); *Venner v. New York Cent. & H.R.R.*, 177 App. Div. 296, 164 N.Y. Supp. 626, *aff'd*, 226 N.Y. 583, 123 N.E. 893 (1919); Comment, 59 MICH. L. REV. 904, 921-27 (1961).

<sup>20</sup> *General Inv. Co. v. Lake Shore & Mich. So. Ry.*, *supra* note 19.

<sup>21</sup> See *Kalmanash v. Smith*, 291 N.Y. 142, 157-58, 51 N.E.2d 681, 688-89 (1943).

junction.<sup>22</sup> Where jurisdiction is well founded, no reason appears why a state court might not treat an adjudication that defendant directors had participated in an antitrust violation which injured their corporation as a conclusive or prima facie demonstration of a breach of common-law duty.<sup>23</sup> And even in the absence of a prior determination in a federal court, there is no compelling reason why a state court should not look to the federal antitrust statutes and cases to give specific content to the common-law duty, although this would seldom seem necessary or useful.<sup>24</sup> Nonetheless, for a period of some thirty-five years after the *Fleitmann* decision, derivative suits in the antitrust context, except for the railroad merger suits,<sup>25</sup> were virtually nonexistent.<sup>26</sup> The unavailability of treble damages, the uncertain scope of injunctive relief in federal courts, and jurisdictional uncertainties<sup>27</sup> combined to produce discouragement.

### B. Effect of the Federal Rules

In 1953 the Court of Appeals for the Second Circuit, in *Fanchon & Marco v. Paramount Pictures, Inc.*,<sup>28</sup> reconsidered the effect of the *Fleitmann* case in the light of the intervening adoption of the Federal Rules of Civil Procedure. The complaining shareholder, Fanchon & Marco, had joined with defendant Paramount Pictures to form the corporation on whose behalf suit was brought, for the purpose of exploiting a lease on a movie theatre. Plaintiff alleged that defendant's course of conduct, adjudged in violation of the antitrust laws in the *Paramount Pictures* case,<sup>29</sup> had caused it loss of profits. The district

<sup>22</sup> *Hand v. Kansas City So. Ry.*, 55 F.2d 712 (S.D.N.Y. 1931); *Guterman v. Pennsylvania R.R.*, 48 F.2d 851 (E.D.N.Y. 1931); *Clayton v. Farish*, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

<sup>23</sup> That a violation of statute need not necessarily constitute a breach of duty to shareholders see discussion at pp. 161, 169 *infra*.

<sup>24</sup> See *Guterman v. Pennsylvania R.R.*, 48 F.2d 851 (E.D.N.Y. 1931); *Underhill v. Schenck*, 238 N.Y. 7, 143 N.E. 773 (1924). It is difficult, perhaps impossible, to conceive of a situation in which the standard of good faith and care which a director acting in his own interest owes to his corporation would demand less than the general standard of conduct required by the antitrust laws.

<sup>25</sup> See cases cited notes 16 and 17 *supra*.

<sup>26</sup> See Comment, *supra* note 6, at 483-84, 489-90.

<sup>27</sup> Compare *Guterman v. Pennsylvania R.R.*, 48 F.2d 851 (E.D.N.Y. 1931), in which a federal district court took a liberal view of state court jurisdiction to support its own jurisdiction on removal, in spite of *General Inv. Co. v. Lake Shore & Mich. So. Ry.*, 260 U.S. 261 (1922), with *Kalmanash v. Smith*, 291 N.Y. 142, 51 N.E.2d 681 (1943), in which, even at a much later date, the New York Court of Appeals took a quite different position. Federal courts also played the jurisdictional shell game, for example, by denying jurisdiction to consider a derivative suit for an accounting and injunction, alleging Sherman Act violations, on the grounds that what was involved was a breach of fiduciary duty and no substantial federal question. *Meyer v. Kansas City So. Ry.*, 84 F.2d 411 (2d Cir. 1936); see note 45 *infra*.

<sup>28</sup> 202 F.2d 731 (2d Cir. 1953).

<sup>29</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

court, following *Fleitmann*, dismissed the complaint,<sup>30</sup> saying of the federal rules that their provision for a single form of action had not changed "the basic difference between law and equity. . . ." <sup>31</sup> On appeal the decision was reversed, Judge Clark's opinion reasoning that the right of a defendant to a jury trial on the treble damages issue—the basic point of the *Fleitmann* analysis—could now be preserved under the more flexible procedures of the new rules; indeed, the lower court's result could only be upheld on the basis that the federal courts were entirely without power to deal with suits of this type, for "the one civil action under the rules is used to vindicate any civil power the district court has," <sup>32</sup> the demand for judgment forming no part of the claim for relief. Reviewing the policy grounds set forth by the Supreme Court in *Koster v. Lumbermen's Mut. Cas. Co.*,<sup>33</sup> the court found no reason why the derivative form of action should not be available in treble damage cases.

Although *Fanchon & Marco* eliminated the conceptual obstacle to derivative treble damage suits, it did not provide answers to other problems arising from the hybrid common-law and statutory bases for the action. Because there has been to date no explicit judicial consideration of these problems, the assumption must be made that the usual doctrines with respect to demand on the board of directors and stockholders, the "business judgment" standard, and the like, are to be applied, as well as such state statutory provisions as those providing for "security for costs" to the corporation.<sup>34</sup> However, discussion of one group of important doctrinal questions will serve as an example of the special considerations which are involved in such suits.

### *C. Business Judgment Defense*

To protect management against unwarranted harassment and intermeddling in normal corporate affairs, the complaining shareholder must show that he has made a sufficient demand on the directors that the action be brought and the company, a nominal defendant in a derivative action, is permitted to defeat the suit at the outset by showing that the decision not to press the company's claim was a reasonable exercise of business judgment by an independent majority of the directors.<sup>35</sup> To make the business judgment defense, evidence

<sup>30</sup> *Fanchon & Marco v. Paramount Pictures Inc.*, 107 F. Supp. 532 (S.D.N.Y. 1952).

<sup>31</sup> *Id.* at 541.

<sup>32</sup> 202 F.2d at 734.

<sup>33</sup> 330 U.S. 518, 522-23 (1947).

<sup>34</sup> See generally STEVENS, CORPORATIONS §§ 169-74 (2d ed. 1949).

<sup>35</sup> See generally Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746 (1960).

may be introduced by management on such questions as the likelihood of success in the proposed litigation, direct and indirect costs of proceeding with it, the probable limits of recovery, and the possibility of difficulty to the company arising from impairment of friendly business relations with the defendants or in the industry generally. When the defendant is an important supplier or customer the last factor may be of decisive importance. But even when the defendant is a competitor, a general distaste to become an antitrust plaintiff may weigh heavily in management's decision. In an ordinary commercial case, it seems reasonable that this consideration be given considerable weight in evaluating the directors' decision. However, it is open to serious question whether Congress' policy of encouraging antitrust enforcement through private suits should be defeated by giving weight to management reluctance to upset perhaps overly amicable relationships within the industry.

The statutory source of the claim provides additional complications with respect to directors' suitable exercise of judgment. The fact that damages proven by the company will be trebled must certainly enter into the decision as to whether suit should be brought. The fact that the offender's conduct is the subject of a government-litigated judgment or decree and the company thus has the benefit of the *prima facie* rule of section 5 of the Clayton Act,<sup>36</sup> would clearly be relevant. On the other hand, where section 5 does not apply and the alleged offense is not *per se* illegal, but subject to the vagaries of a "rule of reason," it is difficult to imagine that an independent business judgment not to litigate could ever be successfully challenged.

### 1. Lack of Disinterested Directors

If the reported cases are a basis for judgment, however, there will usually not be an uninvolved board to make an independent judgment about bringing suit. Whether or not this is because an independent management is usually eager to press antitrust claims, almost all derivative suits of the type here under discussion have involved a charge that controlling directors or shareholders have diverted profits to another company. In this situation—where a disinterested majority of directors is not available—the usual rule is that no demand need be made, because it would be futile.<sup>37</sup> However, the shareholder may be required to make such a demand at a shareholders' meeting if the wrong alleged is one that can be "ratified" and if a majority of shareholders are not involved in the offense. However, there is considerable

<sup>36</sup> 69 Stat. 283 (1955), 15 U.S.C. § 16 (1958), amending 38 Stat. 731 (1914).

<sup>37</sup> STEVENS, CORPORATIONS § 169 (2d ed. 1949).

authority,<sup>38</sup> some recent and well considered,<sup>39</sup> that even a clear disinterested majority of the shareholders cannot ratify injurious management conduct which is illegal under the antitrust laws. In *Rogers v. American Can Co.*,<sup>40</sup> Rogers, a shareholder in Metal & Thermit Corporation, which was engaged in the detinning and sale of tin plate scrap, alleged that a majority of its directors, in conspiracy with American Can Company, owner of 20% of the shares, had caused the company to purchase tin plate scrap from American Can at higher than competitive prices. Acting on Rogers' demand that injunctive relief and treble damages be sought, an independent majority of shares were voted against the proposal. Denying defendants' motion to dismiss and for summary judgment, the court based its decision squarely on the undesirability of permitting a majority of shareholders to bar a derivative suit seeking relief against directors' and shareholders' acts allegedly violating the antitrust laws. The court distinguished between conduct solely "ultra vires the corporation" and violation of "positive law," especially "laws [that] express an important nationwide public policy."<sup>41</sup> It noted as "aggravating factors" that some directors and a major shareholder were among the defendants, that the company was being made to participate "against its will in the conspiracy," and that the alleged wrong continued up to the filing of the complaint and presumably would be continued. This latter factor was central to the decision.

## 2. Continuing Offenses

A distinction has often been made in the cases between, on the one hand, the exercise of business judgment in deciding not to bring suit even though it is admitted that the acts injurious to the corporation were illegal or in breach of duty<sup>42</sup> and, on the other, refusal to bring

<sup>38</sup> *E.g.*, *Continental Sec. Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138 (1912). *But cf.* *S. Solomon & Sons Trust, Inc. v. New England Theatres Operating Co.*, 326 Mass. 99, 93 N.E.2d 241 (1950).

<sup>39</sup> *Gottesman v. General Motors Corp.*, 268 F.2d 194 (2d Cir. 1959); *Rogers v. American Can Co.*, 187 F. Supp. 532 (D.N.J. 1960), *appeal docketed*, No. 13493, 3d Cir., Jan. 12, 1961.

<sup>40</sup> 187 F. Supp. 532 (D.N.J. 1960), *appeal docketed* No. 13493, 3d Cir., Jan. 12, 1961.

<sup>41</sup> *Id.* at 538. It should be noted that cases in federal district courts, such as *Rogers*, are subject to Rule 23(b) of the Federal Rules of Civil Procedure which requires that the complaint "set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." Defendants in *Rogers* argued that the decision in *Hawes v. Oakland*, 104 U.S. 450 (1881), codified in Rule 23(b), required that a negative shareholder vote should bar the derivative action. It is in rejecting this argument that the *Rogers* court distinguished the case before it from one like *Hawes* involving merely an ultra vires act by directors. See generally 3 MOORE, *FEDERAL PRACTICE* ¶¶ 23.16, 23.19 (2d ed. 1948).

<sup>42</sup> *E.g.*, *Kessler v. Ensley Co.*, 123 Fed. 546 (C.C.N.D. Ala. 1903), *cert. denied*, 205 U.S. 541 (1906); *S. Solmont & Sons Trust, Inc. v. New England Theatres Operating Co.*, 326 Mass. 99, 93 N.E.2d 241 (1950).



suit as an invalid attempt to ratify an illegal act.<sup>43</sup> Where the offensive acts are continuing, refusal to seek an injunction against directors seems much more like an attempt to ratify than where the acts have ended and all that might be sought is damages for past injuries.

This distinction, although somewhat conceptual, seems to provide a sound basis for further refinement of analysis in cases involving antitrust allegations. Where the injury is caused by the alleged violations of outsiders not in control of the company, application of business judgment criteria will leave the decision whether or not to sue in the hands of management in all but the most unusual cases. There is no reason to suppose that management will not usually be alert to the possibility of recovering treble damages or obtaining equitable relief against intruders. Thus there is no reason to encourage shareholder intervention in such decisions.<sup>44</sup> The question is closer when directors or influential shareholders are among the alleged offenders, but their course of conduct has been terminated. On the one hand, the deterrent effect of potential treble damage liability is softened if directors, relatively sure of their control of proxy machinery, know they can escape shareholder retribution simply by abandoning doubtful conduct if and when it is called into question. On the other hand, shareholders' suits can hardly be advocated as the ideal instrument of dispassionate antitrust enforcement; perhaps their use is suitably limited to cases in which management is adamant in its pursuit of questionable policies. This type of case—in which the company is the victim of director or shareholder misconduct—always involves a breach of fiduciary duty. It may be argued, indeed, that it is the breach of duty which causes injury, regardless of whether antitrust violations exist, and thus that the federal courts should not open their doors at all in these cases.<sup>45</sup> But a state court's attitude may be that a refusal to sue is a business judgment question even where the offense continues. It seems preferable that federal courts treat the request for injunctive

<sup>43</sup> *E.g.*, *Mayer v. Adams*, 141 A.2d 458 (Del. 1958); *Brewer v. Boston Theater*, 104 Mass. 378 (1870); *Continental Sec. Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138 (1912).

<sup>44</sup> See Note, *supra* note 35, at 760, for an elaboration of reasons. This helpful Note properly emphasizes the distinction between the requirement of demand and the effect to be given to a refusal. However, this distinction fails to observe that the concept of ratification is entirely inappropriate where an injury is being inflicted on a corporation through noncorporate acts, although a decision not to sue may be defensible. Nor does it note the important difference between terminated injuries, involving a decision not to sue for damages, and continuing illegality, involving a decision not to sue for an injunction.

<sup>45</sup> *Meyer v. Kansas City So. Ry.*, 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936), seems to be based on this reasoning. The court in *Rogers* correctly assumes that this case is effectively narrowed by the rationale of *Fanchon & Marco* to a holding on the form of pleadings. *Rogers v. American Can Co.*, 187 F. Supp. 532, 536 (D.N.J. 1960), *appeal docketed*, No. 13493, 3d Cir., Jan. 12, 1961.

relief as controlled by the Clayton Act and deal with the substantive antitrust question. The Clayton Act's mandate that injunctive relief be made available to "any person" against "threatened" injury in these situations should not be defeated through control of proxy machinery, even though the state rule as to demand and ratification may be followed when the only appropriate relief is damages for discontinued conduct. Note that the suggested treatment eliminates any incentive to "doctor up" a simple breach of duty case by casting it as an antitrust offense with an eye on treble damages and access to a federal court.

The *Rogers* case involved continuing conduct; thus its result supports the foregoing analysis. In addition, however, the court refused to dismiss the treble damage claim, reasoning that "the wrongs complained of are not separable by periods of time, but are in the form of a continuing policy."<sup>46</sup> This result seems entirely salutary. If the directors refused to terminate the questionable course of conduct, they should risk treble damage liability for past injury as well as an injunction against its continuation.

## II. ACTIONS TO PREVENT ANTITRUST VIOLATIONS BY THE COMPANY

A second class of derivative antitrust suits is that in which a shareholder seeks to prevent his company from commencing or continuing an allegedly illegal course of conduct. The claim is not that outsiders or controlling directors or shareholders are injuring the company through their violations of the antitrust laws, but that the company may be injured by fines or treble damage judgments arising from conduct in which its management is causing it to engage. Unlike cases such as *Rogers v. American Can Co.*, there is usually no breach of directors' duty to the corporation. Their decision that the corporation shall undertake a course of conduct which the minority regards as questionable is assumed to be taken in good faith and after suitable exercise of business judgment.

### *A. Gomberg v. Midvale Co.*

In *Gomberg v. Midvale Co.*,<sup>47</sup> one cause of action in the complaint alleged that the sale of all the assets of Midvale, an iron and steel producer, would violate the antitrust laws.<sup>48</sup> The purchaser was to be a newly formed corporation, the common stock of which was to be owned by another iron and steel producer and which was to be in part financed by three of Midvale's largest customers. In considering

<sup>46</sup> *Rogers v. American Can Co.*, *supra* note 45, at 540.

<sup>47</sup> 157 F. Supp. 132 (E.D. Pa. 1955), *appeal dismissed sub nom.* Brill v. General Indus. Enterprises, 234 F.2d 465 (3d Cir. 1956).

<sup>48</sup> *Id.* at 138-42.

the defendant's motion to dismiss, the district court assumed the truth of the allegation that injury to Midvale was likely to result from fines or treble damage judgments, but held that injuries of that kind did not constitute "threatened harm or damages which proximately flow from the violations within the meaning of Section 16."<sup>49</sup> This was because "the injury which the laws envision is the injury to the economy of the plaintiff, by virtue of restrictions of trade or something that proximately flows from it, in the competitive field in which it is engaged when the illegal act is committed."<sup>50</sup> Midvale's "economy" would not be injured by the sale of all its assets because it would no longer be in the iron and steel business. However, the court rejected defendant's broader argument that injunctive relief could not be given in a derivative antitrust action, noting that earlier decisions denying the relief to shareholders were distinguishable as involving representative, rather than derivative, causes of action. In the court's view, the logic of *Fanchon & Marco*, although a suit for damages, controlled in actions for injunctive relief.

*B. Ramsburg v. American Inv. Co.*

Because there are indications that the criterion formulated by Judge Ganey in the *Midvale* opinion may be followed in other situations,<sup>51</sup> it will be useful to examine its possible application in more

<sup>49</sup> *Id.* at 142.

<sup>50</sup> *Ibid.* In announcing this criterion, the court relied upon *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), in which a disgruntled group of unions and union members was not permitted to invoke the Sherman Act to enjoin an alleged conspiracy between a rival union and the major motion picture studios. The allegation that independent studios were injured by the conspiracy seemed primarily for the purpose of making a labor dispute situation into an antitrust case. A more straightforward decision might have dealt with defendants' claim that what was involved was an "unfair labor practice" charge within the jurisdiction of the NLRB.

The court in *Midvale* might also have cited the large number of cases denying standing to sue under the antitrust laws to persons injured in their capacity as creditors, *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910), corporate officers, *Corey v. Boston Ice Corp.*, 207 Fed. 465 (D. Mass. 1913), or landlords, *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940). See also *Bookout v. Schine Chain Theatres*, 253 F.2d 292 (2d Cir. 1958); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Cal. 1957). But note that cases involving standing to seek treble damages involve a different section of the Clayton Act. Section 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958), provides that a treble damage claimant must show himself "injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Section 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958), provides that an injunction may be granted on behalf of "any person" who shows "threatened loss or damages by a violation of the antitrust laws. . . ." A different policy question is also involved. To allow anyone other than the corporation to pursue damages gives him an unfair advantage over others who have claims against the corporation. Injunctive relief alone does not present this kind of problem but, as will be noted below, does present other difficult ones. See p. 156.

<sup>51</sup> See *Fein v. Security Banknote Co.*, 157 F. Supp. 146 (S.D.N.Y. 1957), citing *Midvale* and adopting its criterion in denying an injunction in a nonderivative suit by minority directors to prevent an acquisition on the grounds that it violated § 7 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958) amending 38 Stat. 731 (1914).

detail and in similar situations recently before the courts. Almost simultaneously with the *Midvale* decision the Seventh Circuit was deciding *Ramsburg v. American Inv. Co.*,<sup>52</sup> a case presenting the same question of law. Neither court apparently was aware of the existence of the other litigation. The contrasting facts and outcomes are enlightening, although the opinion in the Illinois suit is not. Stockholders of Domestic Finance Corporation brought the action, apparently derivatively, to restrain the merger of their company into American Investment Company on the ground that the merger would violate section 7 of the Clayton Act. The district court's denial of a temporary injunction was appealed, and defendant's motion to dismiss the appeal was denied.<sup>53</sup> Most of the opinion is devoted to the question of mootness raised by the intervening implementation of the merger,<sup>54</sup> consideration of the substantive issue being limited to quotation from and reliance upon *Fanchon & Marco*. An important difference between this case and *Midvale* is that before the merger Domestic was under the control of American as a result of the latter's acquisition of some 80% of the former's outstanding shares and election of a board of directors composed of its own officers. It was alleged that the merger was for the benefit of American; thus carrying it forward would be a breach of the directors' common-law duties. It was also alleged that the directors had so managed Domestic's affairs prior to the merger as to reduce its effectiveness as a competitor with American. Thus *Ramsburg* is much more like *Rogers v. American Can Co.* and the other cases discussed in the preceding section than like *Midvale*, because defendants' course of action would have caused the injury primarily complained of regardless of whether it was illegal under the antitrust laws. As in *Midvale*, however, the complaining corporation would cease to exist and, consistently with *Midvale*, the antitrust count—although not necessarily any common-law counts—would be dismissed. Unfortunately, the opinion's failure of exposition makes the decision in *Ramsburg* of little value on these questions.

### C. *Schechtman v. Wolfson*

The Second Circuit has recently dealt with a related problem to which its approach provides an instructive comparison with that of *Midvale*. In *Schechtman v. Wolfson*,<sup>55</sup> a shareholder of Merritt-

<sup>52</sup> 231 F.2d 33 (7th Cir. 1956).

<sup>53</sup> No opinion is reported in the district court. Letters from counsel indicate that the case was settled shortly after the denial of the motion to dismiss the appeal.

<sup>54</sup> On this point, too, the litigation may be contrasted with *Midvale* in which the Third Circuit held on appeal that the intervening merger rendered the case moot. *Brill v. General Indus. Enterprises*, 234 F.2d 465 (3d Cir. 1956).

<sup>55</sup> 244 F.2d 537 (2d Cir. 1957).

Chapman & Scott Corporation, a corporation of which Wolfson and other defendants were directors, brought a derivative suit to enjoin them from simultaneously holding directorships in Montgomery Ward & Co., which was alleged to be in some respects a competitor of the complaining company. These facts were said to violate the "interlocking directorate" provision of section 8 of the Clayton Act. After the district court refused to dismiss the complaint for failing to state a cause of action,<sup>56</sup> defendants resigned from the Montgomery Ward board, and the suit became moot. The lower court's refusal to award attorney's fees to the complainant was upheld on appeal on the ground that the suit had conferred no adequate benefit on the corporation. The opinions both on appeal and below leave little doubt that if the defendants had not resigned, injunctive relief would have been appropriate on a showing that the statutory criteria were satisfied.<sup>57</sup> It will be noted that here there was no possibility of direct injury to the company, because the statute runs only against offending individuals.<sup>58</sup> This is why no fees were in order. Furthermore, it cannot be said, in Judge Ganey's terms, that there was a threat of injury to the "economy" of the plaintiff from the interlocking directorates—at least no injury of a kind different from that of *Midvale*, which was in effect being merged into a competitor. Thus Judge Ganey would consistently have granted the motion to dismiss. Possible reasons why the courts have differed will be suggested in a moment.

#### D. A Suggested Rationale

Returning to a more general discussion of the criterion suggested in *Midvale*, what *may* constitute an "injury to the economy of the plaintiff" for which a shareholder may seek relief? Certainly the acts of competitors, suppliers, or customers, which affect prices or other conditions in the market and violate the antitrust laws, must be included.<sup>59</sup> But can any conduct in which the company itself participates—at the instance of its management, of course—injure its own

<sup>56</sup> *Schechtman v. Wolfson*, 141 F. Supp. 453 (S.D.N.Y. 1956).

<sup>57</sup> Section 8 provides: "No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce . . . if such corporations are or shall have been theretofore . . . competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 38 Stat. 732 (1914), as amended, 15 U.S.C. § 19 (1952). (Emphasis added.) Note for the subsequent argument that the elimination of competition "by agreement" is virtually always a per se offense under § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958); thus the criteria are very easily shown to be satisfied.

<sup>58</sup> See note 57 *supra*.

<sup>59</sup> There is, however, authority that a supplier of a directly injured company does not have standing to sue for treble damages. *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956). Compare note 50 *supra*, analyzing §§ 4 and 16 of the Clayton Act.

"economy"? Price-fixing injures the competitive health of the market, but presumably the company's management, at any rate, believes that it adds to the plaintiff's economic well-being. This view would seem to lead to the result that a derivative suit is never available under section 16 to prevent management from adopting policies involving antitrust risks.

The problem presented in this class of cases is a difficult one. On the one extreme, it seems clear that the judicial power should not be easily invoked by a shareholder or any other private litigant to force a corporation into a full-scale "big case" economic analysis of any substantial acquisition or sale of corporate assets or stock, any requirements or supply contract, or any franchise system, for example. Not only to prevent harassment in circumstances under which "strike suits" might particularly flourish but, equally important, to avoid litigation of inadequately prepared issues, courts should be reluctant to permit this kind of issue to be brought to trial by anyone other than the Government or a private suitor whose very substantial interests are seriously threatened. On the other hand, it is established doctrine that a shareholder or minority director has the right to intervene for the corporation to prevent or terminate its participation in a clearly illegal act, even though no threat of immediate economic injury to the company can be shown.<sup>60</sup> How much stronger is the argument when he offers to show that his company is being made to pursue a continuing course of illegal conduct, which is likely to result in very serious financial injury through fines or widespread treble damage suits. The criterion advanced in *Midvale* is inadequate in that it appears to bar cases on the wrong basis—it would seem usually to permit a competitor, supplier, or customer to bring suit on this kind of issue, while always denying that right to the corporation itself or, it would seem, minority directors.<sup>61</sup>

A rough dividing line seems to suggest itself. On one side are single large transactions (such as mergers) which must be judged by general criteria of reasonableness or effect on competition and are unlikely to result in demonstrable damages to potential treble damage plaintiffs. On the other are continuing courses of conduct (such as price-fixing) to which per se rules apply or which are very likely to produce a multiplicity of treble damage claims. In the latter class of cases, but not the former, shareholder intervention through derivative suits seems defensible. By these standards the antitrust counts in

<sup>60</sup> *Shawnee Compress Co. v. Anderson*, 209 U.S. 423 (1908); *Graves v. Cambria Steel Co.*, 298 Fed. 761 (S.D.N.Y. 1924); *De Koven v. Lake Shore & Mich. So. Ry.*, 216 Fed. 955 (S.D.N.Y. 1914).

<sup>61</sup> See note 51 *supra*.

*Midvale* and *Ramsburg* would seem to be excluded. Thus *Midvale* was properly decided, although on unpersuasive reasoning, and the *Ramsburg* court, in being willing to proceed on the antitrust allegation, was wrong. Because of the clear statutory criteria and simplicity of proof, a section 8 count, as in *Schechtman*, might suitably be entertained in a derivative action, although it is difficult to disagree with the Second Circuit that a better showing of benefit to the corporation than there made is needed for attorney's fees to be assessed against the corporation. The large number of possible antitrust situations which do not line up so neatly will, of course, present the courts with problems of judgment in balancing these and perhaps other factors in ruling on motions to dismiss. But the policy of section 16 seems clearly to call for the extension of preventive private antitrust actions as far as may be consistent with sound judicial development of the law. Congressional purpose should not be thwarted by statutory interpretation which may unnecessarily and arbitrarily bar derivative suits whose prosecution would be salutary. Neither should the door be unnecessarily open to adventurers or capricious suitors. The appropriate balance can best be achieved by decisions which take into account and make explicit this statutory purpose in the light of all the relevant factual circumstances.

### III. ACTIONS TO RECOVER FROM RESPONSIBLE OFFICERS AND DIRECTORS

The final problem to be considered is that of the availability of shareholders' derivative suits for recovery from officers and directors of fines, forfeitures, damages, litigation expenses, and other costs to the corporation resulting from activities which the management has expressly or impliedly sanctioned and which have later been adjudged in violation of the antitrust laws.<sup>62</sup>

Any liability which may arise in these circumstances stems from common-law doctrines, not from the antitrust statutes as such.<sup>63</sup> If the corporation's antitrust violation took the form of a conspiracy or

<sup>62</sup> The obverse problem, in itself outside the scope of this discussion, is whether a director can obtain reimbursement from the corporation for expenses incurred or fines paid in an unsuccessful defense of an antitrust suit stemming entirely from his acts on behalf of the corporation. This complex question has at least two major branches: first, whether the director can obtain reimbursement as a matter of right and second, whether the corporation can authorize reimbursement. Both questions are affected by statutory provisions in a number of major commercial states and the latter, at any rate, may be affected by the presence of corporate charter or bylaw provisions of different kinds. See generally Bishop, *Current Status of Corporate Directors' Right to Indemnification*, 69 HARV. L. REV. 1057 (1956). The variety of statutes is surveyed in Frampton, *Indemnification of Insiders' Litigation Expenses*, 23 LAW AND CONTEMP. PROB. 325 (1958).

<sup>63</sup> See generally STEVENS, CORPORATIONS §§ 151-54 (2d ed. 1949). Of course, the common-law right may be affected by a statute spelling out directors' duties. These, however, are usually treated as codifications of traditional doctrines. See, e.g., N.Y.

combination in which defendant directors have been proven to have participated, the corporation's problems of proof may be easier,<sup>64</sup> but otherwise this fact should not be relevant. Indeed, for clarity of analysis, we may assume for the following discussion that only the corporation has been found in violation of the antitrust laws and that no antitrust allegation is made against any of the defendants in the derivative action. Thus our hypothetical case may be found in a state court or in a federal court under diversity jurisdiction.

The doctrinal starting point, of course, is that the directors of a corporation are in some sense its agents for the purposes of carrying on its affairs as provided in relevant statutes, charter, and bylaws.<sup>65</sup> As such, they owe to their principal a duty, in general terms, of acting in good faith and using reasonable care in conducting its business, and may be liable to it for losses caused by any breach of that duty. In the kind of case here under discussion, no question as to the absence of good faith arises; no conflict of interest or possibility of disloyalty or malice is involved.<sup>66</sup> The question is solely whether director action in expressly or tacitly approving the illegal course of conduct, or failing to prevent it, adds up to a failure of due care which has caused loss or unnecessary expense to the company.

### *A. Standard of Care*

Courts have not agreed in their attempts to define, even at only a slightly lower level of generality, the content of the standard of directors' care. Perhaps the most common formulation is that a director—at least an "inside" director—is held to the same degree of

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GEN. CORP. LAW § 60. An argument can be made that a corporation may recover from its directors under § 4 of the Clayton Act, which makes a treble damage claim available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). The company's fines and other expenses or losses may be considered as such injuries caused by the directors' illegal participation in the combination or conspiracy. This could result in directors' liability nine times the damages proven by the original injured party—certainly an unintended windfall for the corporation. But § 4 has been narrowly interpreted to exclude plaintiffs not in the "target area" of the violation. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955) (dictum); cf. note 50 *supra*. Thus, there is no substantial likelihood that this startling result will be reached. Cf. Comment, 59 MICH. L. REV. 904, 912-29 (1961).

<sup>64</sup> However, an adjudication in a Government suit or a treble damages action that a director has been involved in an illegal activity is not *res judicata* in a later suit on behalf of the corporation, nor will collateral estoppel necessarily apply. See generally 1 MOORE, FEDERAL PRACTICE ¶ 0.401 (2d ed. Supp. 1960). Section 5 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 5 (1958), provides that a "final judgment or decree" in an antitrust proceeding shall be "prima facie evidence . . . in any action or proceeding brought by any other party against such defendant *under said laws*." (Emphasis added.) However, the derivative action alleging breach of duty to the corporation is not "under" the antitrust laws, so presumably section 5 is not applicable. See text accompanying note 103 *infra*.

<sup>65</sup> See STEVENS, CORPORATIONS § 143 (2d ed. 1949).

<sup>66</sup> In this respect the cases to be discussed are unlike those dealt with in part I of this Article, which typically involve director disloyalty, and similar to those discussed in part II, which do not.



care in making decisions regarding corporate affairs as the "ordinarily prudent man in the conduct of his own affairs."<sup>67</sup> Some courts and commentators have indicated that this is a more than usually strict standard and that the appropriate criterion is "the diligent care which ordinarily prudent men would exercise under similar circumstances in like positions."<sup>68</sup> A few jurisdictions still follow the older and least exacting rule of liability only for gross negligence.<sup>69</sup> All agree, however, that a director will not be held liable for "mere errors of business judgment" when there has been no negligence, and that there is a presumption of the regularity of director action.<sup>70</sup>

Even if there were more general agreement upon a formulation, however, such necessarily broad standards leave the trier of fact with little guidance in specific situations. An attempt will be made here to add some degree of specificity in a narrow antitrust context. The kind of situation to be discussed is that in which the directors of a corporation have thoroughly considered and, by their action or inaction, sanctioned a course of corporate conduct which they know or should know involves a substantial risk of antitrust violation. Discussion will not extend to the range of problems which arise when all of the directors are not aware of a questionable practice sanctioned by top management, or when top management itself is incompletely informed about activities at the operating level.<sup>71</sup>

<sup>67</sup> See, e.g., PA. STAT. ANN. tit. 15, § 2852-408 (Supp. 1960), *Scott v. Stanton Heights Corp.*, 388 Pa. 628, 131 A.2d 113 (1957). Early New York cases show a similar formulation. See, e.g., *Cavanaugh v. Gould*, 223 N.Y. 103, 119 N.E. 237 (1918); *Hun v. Cary*, 82 N.Y. 65 (1880) (dictum). But see *Blaustein v. Pan American Petroleum & Transp. Co.*, 293 N.Y. 281, 304, 56 N.E.2d 705, 715 (1944): "The law requires of directors that they shall exercise in good faith that care which the problems confronting the corporation demand."

<sup>68</sup> E.g., *Briggs v. Spaulding*, 141 U.S. 132, 152 (1890); *STEVENS, CORPORATIONS* § 151, at 710 (2d ed. 1949); see *Anderson v. Bundy*, 161 Va. 1, 14-21, 171 S.E. 501, 505-08 (1933) (dictum).

<sup>69</sup> E.g., *Medford Trust Co. v. McKnight*, 292 Mass. 1, 30, 197 N.E. 649, 667 (1935).

<sup>70</sup> 3 FLETCHER, PRIVATE CORPORATIONS § 1039 (perm. ed. 1947); *STEVENS, CORPORATIONS* § 151, at 711-12 (2d ed. 1949). Interesting discussions of the origins of the doctrines are to be found in Rhoads, *Personal Liability of Directors for Corporate Mismanagement*, 65 U. PA. L. REV. 128 (1916), and Dwight, *The Liability of Corporate Directors*, 17 YALE L.J. 33 (1907). See also SPELLMAN, CORPORATE DIRECTORS § 207 (1931).

<sup>71</sup> Thus excluded from discussion is the much debated but little litigated question of the extent to which the role played by an individual director in corporate affairs determines the standard of care in obtaining information to which he will be held. Judicial implementation of standards in this situation cannot overlook the technological fact that an industrial organization may become so immense and diverse in activity as almost inevitably to develop such blockages of internal communication that the top managerial group may in fact not be fully informed with respect to many important matters at the operating levels. However, appropriate treatment must also consider the policy question whether effective social control of corporate acts demands that those in whom ultimate authority reposes be held responsible for being informed, without regard to actual knowledge or perhaps even traditional concepts of negligence. See generally 3 FLETCHER, PRIVATE CORPORATIONS § 1032 (perm. ed. 1947); Note, *A Defense of Non-Managing Directors*, 5 U. CHI. L. REV. 668 (1938).

## 1. Strict Liability

How does one analyze the problem of director liability in these situations? The simplest and harshest approach, fortunately supportable only by occasional loose dicta or by indefensible reasoning or analogy, would be to hold directors strictly liable for concurring in any acts later adjudged in violation of the antitrust statutes. The argument for this position may take one of two forms. The first is that a common-law rule of negligence per se applies when injuries result from acts which are illegal, the statutory standards supplanting or giving specific content to the more general standard of due care.<sup>72</sup> Thus a motorist violating an ordinance against speeding will be held liable for injuries caused by an accident, without the usual determination of negligence. This argument is weak not only in making use of a doctrine which is increasingly disfavored,<sup>73</sup> but also, as applied to antitrust violations, in failing to consider a crucial condition for the doctrine to apply—that the injury must be within the class of injuries which the statute was intended to prevent.<sup>74</sup> The antitrust laws are designed to prevent injuries to the competitive economy, not to prevent the financial injuries which a corporation may suffer, in the form of penalties, when its directors have led it into an antitrust violation. Thus the doctrine is misapplied.

The second argument, closely related to *ultra vires*, is that the directors act outside their authority whenever their direction causes the corporation to act beyond the powers provided by statute or in its charter. When there is no authority for their action—as when it is illegal—ultimate liability must rest with them and not on the corporation.<sup>75</sup> This approach finds some support in the cases, but only in limited situations quite removed from the antitrust context.<sup>76</sup> Thus, if a statute contains detailed and unambiguous mandatory provisions

<sup>72</sup> See, e.g., *Cockrill v. Cooper*, 86 Fed. 7, 12 (8th Cir. 1898) (federal banking statute "creates a fixed standard . . . indicative of negligence . . ."); *Thompson v. Greeley*, 107 Mo. 577, 592, 17 S.W. 962, 966 (1891) ("every violation of law is a breach of duty"). The doctrine of negligence per se in its general application is discussed and criticized in 2 HARPER & JAMES, TORTS §§ 17.5, 17.6 (1956).

<sup>73</sup> See 2 HARPER & JAMES, TORTS § 17.6, at 998-1011 (1956). Compare *Morris, The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); *Thayer, Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1913).

<sup>74</sup> 2 HARPER & JAMES, TORTS § 17.5, at 989-92 (1956).

<sup>75</sup> E.g., *Southern Counties Thrift Co. v. Rairdon*, 47 Cal. App. 2d 770, 118 P.2d 828 (Dist. Ct. App. 1941); *Sheldon v. Bills*, 102 Neb. 93, 166 N.W. 117 (1918); *Gilbert v. Finch*, 173 N.Y. 455, 66 N.E. 133 (1903); *Roth v. Robertson*, 64 Misc. 343, 118 N.Y. Supp. 351 (Sup. Ct. 1909); cf. *Corsicana Nat'l Bank v. Johnson*, 251 U.S. 68 (1919); *Seventeenth Ward Bank v. Smith*, 51 App. Div. 259, 64 N.Y. Supp. 888 (1900).

<sup>76</sup> The approach is thoroughly discredited as a means of avoiding corporate liability to injured outsiders, in part because it would place the corporation above responsibility for tortious or other injurious acts by its agents. See, e.g., STEVENS, CORPORATIONS § 63 (2d ed. 1949).

with respect to the manner in which specific corporate affairs are to be conducted, and the failure of directors to comply causes loss or injury, liability may follow without an inquiry whether the act itself, apart from the statute, was negligent.<sup>77</sup> This result may be reached even though there is no specific statutory provision for director responsibility.<sup>78</sup> The most common examples are laws regulating financial institutions by prohibiting or limiting certain clearly defined classes of loans or investments.<sup>79</sup> Directors have been held liable without reference to negligence in a variety of circumstances in which they have carried out corporate transactions in a manner not authorized by statute, even where no self-dealing was evident.<sup>80</sup> Perhaps the most common cases are those in which dividends have been declared out of capital.<sup>81</sup> Likewise, when business is transacted beyond the scope of the charter, directors may be held liable regardless of negligence in the absence of acquiescence by shareholders.<sup>82</sup> More recent opinions, however, seem to place increasing emphasis on the directors' exercise of "informed judgment."<sup>83</sup> Perhaps more generally significant, decisions are increasingly reflecting the view that director liability for injurious acts beyond their statutory authority or "ultra vires" should turn not upon the interpretation ultimately given the statute or charter by the court, but upon the directors' exercise of due care in working out the interpretation on which they acted.<sup>84</sup>

<sup>77</sup> *E.g.*, *Thompson v. Greeley*, 107 Mo. 577, 17 S.W. 962 (1891) (statute limiting amount of loans); *Runcie v. Corn Exchange Bank Trust Co.*, 6 N.Y.S.2d 616 (Sup. Ct. 1938) (statute limiting acceptability of fidelity bonds); *Broderick v. Marcus*, 152 Misc. 413, 272 N.Y. Supp. 455 (Sup. Ct. 1934) (statute limiting amount of loans).

<sup>78</sup> *E.g.*, *Southern Counties Thrift Co. v. Rairdon*, 47 Cal. App. 2d 770, 118 P.2d 828 (Dist. Ct. App. 1941) (industrial loan company statute); *Van Schaick v. Carr*, 170 Misc. 539, 10 N.Y.S.2d 567 (Sup. Ct. 1938) (insurance law); *Van Schaick v. Aron*, 170 Misc. 520, 10 N.Y.S.2d 550 (Sup. Ct. 1938) (insurance law). *But cf.* *Bramlette v. Joseph*, 111 Miss. 379, 71 So. 643 (1916) (banking statute).

<sup>79</sup> See cases cited notes 72, 77, 78 *supra*.

<sup>80</sup> *E.g.*, *Runcie v. Corn Exchange Bank Trust Co.*, 6 N.Y.S.2d 616 (Sup. Ct. 1938); *Walker v. Man*, 142 Misc. 277, 253 N.Y. Supp. 458 (Sup. Ct. 1931).

<sup>81</sup> *E.g.*, *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 8 N.E.2d 895 (1937); *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 109 N.E. 875 (1915); *Singer v. Carlisle*, 26 N.Y.S.2d 172 (Sup. Ct. 1940), *aff'd mem.*, 261 App. Div. 897, 26 N.Y.S.2d 320 (1941); *Walker v. Man*, *supra* note 80.

<sup>82</sup> *E.g.*, *Fergus Falls Woolen Mills Co. v. Boyum*, 136 Minn. 411, 162 N.W. 516 (1917) (charter imposed limit on corporation's debt); *Holmes, Booth & Haydens v. Willard*, 125 N.Y. 75, 25 N.E. 1083 (1890) (charter authorized only metal manufacturing).

<sup>83</sup> See, *e.g.*, *Medford Trust Co. v. McKnight*, 292 Mass. 1, 33-35, 197 N.E. 649, 668-69 (1935) ("due care" in ascertaining earnings, though erroneous, protects from liability for illegal dividends).

<sup>84</sup> See *Spirit v. Bechtel*, 232 F.2d 241 (2d Cir. 1956) (directors not liable after careful but erroneous reading of income tax decisions and rulings); *Harman v. Morris*, 36 N.Y.S.2d 756 (Sup. Ct. 1942) (directors not liable for interpretation of charter limitation on use of "surplus property"); *Alderman v. Alderman*, 178 S.C. 9, 181 S.E. 897 (1935) (directors not liable to corporation on "ultra vires" contracts where no failure of care); *cf. Medford Trust Co. v. McKnight*, *supra* note 83, at 21-22, 197 N.E. at 662-63 (directors liable for "ultra vires" loss because of failure of care in reading statute).

To argue that in general these cases support a negligence per se theory of director liability, seems unjustified. In most of those in which liability was found, the court specifically noted that the statute was so clear that its mandate could not have been misunderstood. Thus any act implementing a violation was clearly either negligent and a breach of the duty of due care or, worse, a willful act not to be imputed to the corporation. No one familiar with the antitrust laws need be reminded that, unlike the detailed regulatory provisions involved in these cases, the Sherman Act, at any rate, is of a "constitutional" generality,<sup>85</sup> Congress having chosen to defer to the courts in deciding broad questions of applicability. Indeed, its proscription of "every contract, combination . . . or conspiracy in restraint of trade" and "monopolizing" is among the broadest grants of judicial discretion to be found in American legislation. The contrast in the nature of the two types of statutes could hardly be greater. Thus these cases, though large in number, seem to be of rather limited applicability to antitrust situations.<sup>86</sup>

## 2. Business Judgment Approach

The approach at the opposite extreme would be to apply the "business judgment" criterion to the possibility of antitrust penalties in the same manner as to a business decision not involving possible illegality. This argument requires elaboration. It starts with the observation that American law recognizes the corporation as an important instrumentality for the organization of private ownership and control of a wide range of business activity. Although in some senses the corporation is "owned" by its shareholders, its directors must make all but a few extraordinary corporate decisions specified by statute. In so doing, however, they have certain legal responsibilities to the corporation, most of which are "negative" in nature: to refrain from willful or negligent waste of its assets or from diverting its profits or seizing business opportunities, for example. But there is

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<sup>85</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

<sup>86</sup> Most of the cases imposing liability have arisen at the behest of banking or insurance commissioners or trustees in bankruptcy seeking to accumulate a fund for bondholders or creditors of bankrupt institutions. At least in these circumstances the managers of such institutions may be held to a higher standard of caution as to statutory implications than applies to the managers of business corporations generally. *Hun v. Cary*, 82 N.Y. 65, 71 (1880). Perhaps the most important common element in these cases, however, is the basic notion that a corporation, as an artificial creature of the state, has authority to act only as specifically authorized. Where statutes spell out modes of carrying out fundamental corporate acts, directors purporting to sanction nonconforming behavior are acting without authority. By contrast, it is exceedingly difficult to find cases applying a strict liability approach to injuries to a business corporation resulting from transgressions committed by it while engaged in activities in the usual course of the business authorized generally by its charter's "purpose" clause.

a general affirmative responsibility recognized in law—and most certainly foremost in the minds of the business community—to manage the corporation in the longrun best interest of its shareholders. In a large company whose stock is widely held, this obligation is primarily to manage the business so as to make the company as profitable—and thus as valuable—as ability permits, within the “rules of the game” set by law. The antitrust laws often appear to be in head-on conflict with this objective. In industries whose product demand is inelastic over a substantial range of prices—and there are many—it may be possible to increase a firm’s revenues enormously by following courses of conduct prevented primarily by the threat of the antitrust laws. For the corporation this threat takes the primary form of a risk of loss from treble damage judgments, costs of litigation, and fines or forfeitures, and a risk of restriction by a decree which limits corporate activities or holdings. Evaluation of the degree of risk turns on the probabilities of being detected and prosecuted and of succeeding in court either on the law or the burden of establishing the facts, and on the possible penalties, the extent of exposure to treble damage claims, and related matters. If the usual “business judgment”—and no other—criterion were applied, directors might freely decide to cause the corporation intentionally to violate the law, so long as they take into account the risks involved and find the anticipated profits worth the gamble. No director liability to the corporation would exist if the decision were made after due consideration and solely to advance the interests of the corporation. Even a serious error in judgment in balancing probabilities would produce no liability, so long as it did not result from failure of due care in becoming informed and were not so egregious that the decision could not have been honestly believed to be in the best interests of the corporation.

### *B. Cases Involving Antitrust Violations*

Neither of these extreme approaches has won the approval of the courts in the very few cases involving antitrust violations.

Thus in *Simon v. Socony-Vacuum Oil Co.*<sup>87</sup> a derivative suit was brought against directors to recover fines and expenses—including fines levied against defendant directors but paid by the corporation—arising from the *Madison Oil* litigation.<sup>88</sup> Socony-Vacuum had been one of a group of major midwestern oil companies indicted, along with many of their directors, for violation of section 1 of the Sherman Act in

<sup>87</sup> 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944).

<sup>88</sup> *United States v. Standard Oil Co.*, 23 F. Supp. 937 (W.D. Wis. 1938).

participating in a combination and conspiracy for the purpose of raising or fixing prices of gasoline at the jobber, retailer, and "spot market" levels. Their conviction in a jury trial was reversed by the court of appeals<sup>89</sup> on the ground that the trial judge's charge to the jury was based on the theory that such a combination was illegal per se. The appellate court's view was that defendants' activities were not unlawful unless they constituted an unreasonable restraint of trade. The Supreme Court, however, in a 5-to-2 decision, reinstated the verdict.<sup>90</sup> The major disagreement was whether the Court's decision in *Appalachian Coals, Inc. v. United States*<sup>91</sup> had modified or created an exception to the law with respect to horizontal price-fixing set forth in *United States v. Trenton Potteries Co.*<sup>92</sup> *Trenton Potteries* seemed to have clearly established that price agreements by members of a combination controlling a substantial part of an industry were illegal per se. However, in *Appalachian Coals*, decided in the depression year 1933, the Court refused to hold illegal an exclusive selling agency entered into by bituminous coal producers in the Appalachian region, though the arrangement, when put into effect, would seem clearly to have curtailed price competition in a substantial part of the industry. Chief Justice Hughes' opinion seems largely to have based the decision on the unusually depressed economic conditions in the industry and the presence of "destructive practices" which the selling agency sought to "remedy." These are arguments, of course, which would not have seemed to be available after *Trenton Potteries*, but the opinion does not discuss that case. Even Justice Douglas, writing for the majority in *Madison Oil*, seven years later, fails persuasively to reconcile *Appalachian Coals* with either the formulation of the per se rule which he undertakes or with *Trenton Potteries*<sup>93</sup>; indeed, the treatment of *Appalachian Coals* in later decisions and by commentators seems to indicate that it is to be limited to its own special facts.<sup>94</sup>

But in 1934-36, when the directors of Socony-Vacuum were seeking to find a solution to the depressed conditions in their industry—which they doubtless had some reason to regard as nearly as critical as that of the coal industry—this would hardly have been assumed. Furthermore, their program of price stabilization seemed to have governmental approval. It evolved in part from activities of the National Re-

<sup>89</sup> *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809 (7th Cir. 1939).

<sup>90</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>91</sup> 288 U.S. 344 (1933).

<sup>92</sup> 273 U.S. 392 (1927).

<sup>93</sup> See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 214-16 (1940).

<sup>94</sup> See, e.g., *Virginia Excelsior Mills v. F.T.C.*, 256 F.2d 538 (4th Cir. 1958); NEALE, THE ANTITRUST LAWS OF THE U.S.A. 41 (1960).

covery Administration's Petroleum Administrative Board, whose head had "authorized" the program's organizer to take such action consistent with the NRA as was needed to restore markets to their "normal" conditions.<sup>95</sup> However, as Justice Douglas' opinion points out,<sup>96</sup> no immunity from antitrust violation could be derived from such informal administrative acts.

The holding of the New York court in the derivative suit not only denied recovery of the corporation's fines and expenses, but sanctioned payment by the corporation of fines imposed upon the directors individually. The court said that the directors, in entering into the illegal transactions, "acted honestly and reasonably and for what they believed to be the best interests of the company";<sup>97</sup> there was no showing that they "acted fraudulently, negligently, or corruptly or in bad faith" or that "they knew, or had reason to believe, that the buying program violated the Sherman Act. . . . [A]t most, they made an honest and reasonable mistake or error of judgment or of law."<sup>98</sup> Liability was denied because if directors act "in good faith and exercise reasonable care . . . they are not liable for mistakes or errors of judgment, either of law or of fact."<sup>99</sup> The court specifically rejected the view that liability automatically resulted from illegal acts, noting that the question turned on "the nature of the prohibited act; whether the statute is plain and unambiguous, and whether it contains a limitation or restriction on the powers of the corporation or the powers or duties of the directors themselves."<sup>100</sup> The opinion specifically notes the disagreement among the courts and the Justices as to the relevance of *Appalachian Coals* to the legality of the condemned buying program.<sup>101</sup> The court concludes:

It seems to follow that, as defendants did not knowingly exceed their authority or the authority of the corporation, and did not know or believe or have reason to believe that their participation in the buying program was prohibited by the Sherman Act, they cannot be held personally liable for damages. Nor can they be held personally liable for legal and other expenses incurred by the defendant corporation in defending the criminal prosecutions, even though the directors were party defendants, and even though the defense was unsuccessful, for the interests of the corporation were sufficiently threatened by the prosecution to warrant the employ-

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<sup>95</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 175-76 (1940).

<sup>96</sup> *Id.* at 225-27.

<sup>97</sup> *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 203, 38 N.Y.S.2d 270, 273 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944).

<sup>98</sup> *Id.* at 203-04, 38 N.Y.S.2d at 273.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Id.* at 204, 38 N.Y.S.2d at 274.

<sup>101</sup> *Id.* at 203, 38 N.Y.S.2d at 272.

ment of counsel to defend it. . . . Neither can the defendants be held personally liable because it paid the fines of the defendants Arnott and Maguire on their plea of *nolo contendere* . . . for, by that plea, a valuable consideration moved from the defendants to the corporation, and the corporation clearly benefited thereby.<sup>102</sup>

There have been few attempts since *Simon* to press corporate claims against directors arising from antitrust situations—at least few which have produced reported litigation. In *Clayton v. Farish*,<sup>103</sup> the most important of these, derivative suits were brought on behalf of Standard Oil Company (New Jersey) and certain subsidiaries against its directors and I. G. Farbenindustrie A. G., alleging, *inter alia*, that a conspiracy among the defendants resulted in a cartel agreement which was designed to prevent Standard from entering into competition with I. G. Farben in the chemical business normal to Standard's oil operations. It was alleged that the conspiracy and cartel agreement violated the federal antitrust laws and that after a plea of guilty in a Government prosecution Standard Oil had been made to enter into a decree which provided for royalty-free licensing of certain of its patents and processes and imposed fines. In addition to large allegedly improper payments to I. G. Farben and profits allegedly lost, damages were claimed for losses caused by the forfeiture of royalty rights resulting from the decree and fines aggregating \$35,000. Defendants challenged jurisdiction by a motion to dismiss. The trial court denied the motion, affirming its jurisdiction to deal with a case properly characterized as one sounding in breach of directors' duty. It based its reasoning in part on the fact that *Meyer v. Kansas City Southern Railway*<sup>104</sup> appeared to limit the availability of federal courts in situations in which the violation of the antitrust laws also constituted an act of director disloyalty. Discussing the losses to Standard Oil alleged to result from the provisions of the decree, the court stated:

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<sup>102</sup> *Id.* at 205-06, 38 N.Y.S.2d at 274-75. The same result as to reimbursement of the fines paid by the directors would presumably not be reached today. The first New York statute pertaining to indemnification and reimbursement became effective on April 2, 1941, before the decision in this case but after the operative facts giving rise to the derivative suit. There was no mention of the then recently enacted statute in the opinion. The statute, as amended, however, has since been interpreted not to authorize reimbursement of expenses flowing from criminal prosecutions under the antitrust statutes. *Schwarz v. General Aniline & Film Corp.*, 305 N.Y. 395, 113 N.E.2d 533 (1953). The decision has been widely criticized, commentators preferring the analysis of Judge Fuld's dissent. See, e.g., Bishop, *supra* note 62, at 1074-77. Because the decision turns on interpretation of the statutory word "misconduct" it is not directly relevant to the present discussion. See text accompanying notes 107-08 *infra*.

<sup>103</sup> 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

<sup>104</sup> 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936). See note 45 *supra* and accompanying text.



[L]iability cannot be imposed on defendants by this court merely because they violated the Federal Antitrust Laws. The basis of their liability here must be acts which fail to conform to their fiduciary duty to Standard . . . . *But once liability has been established on that basis, the measure of damage is the entire loss sustained by Standard, which should include all damages or penalties paid by Standard to others as the result of the self-same unlawful acts.*<sup>105</sup>

Thus, as in *Simon*, the court rejected any notion of strict liability. But the approach was not at all the same. The opinion continues:

If defendants avoided competing with I. G. because they wished to serve its interests in preference to those of Standard, that is a wrongful act for the consequences of which they must answer to the corporation. If that wrongful act has the additional vice of violating the Federal Antitrust Laws as the result of which Standard is required to forfeit its rights to royalties . . . or to pay damages or fines, those losses to Standard are the direct result of defendants' acts which this court may redress. . . . Of course, at the trial plaintiffs will have to establish that this penalty in the antitrust decree was imposed because of those acts of defendants which violated our law covering the duties of directors, and not because of acts which violated only the Federal Antitrust Law.<sup>106</sup>

While the *Simon* court was concerned with whether the directors had acted in good faith and exercised due care in charting the company's course of action in the light of a risk of illegality, the *Clayton v. Farish* rationale would hold the directors only if they were disloyal. Thus, whereas the *Simon* rationale might find directors liable though they are quite loyal to the company but fail to use due care to prevent an illegal course of action, the *Clayton* court would seem to limit its jurisdiction to situations in which the directors' action would be grounds for liability even though no antitrust laws were on the books. The importance of the difference is illustrated by a specific example. If the course of conduct were that of entering into an illegal price-fixing agreement with competitors, which increased the company's revenues but later resulted in antitrust penalties, the *Clayton* rationale would appear to deny a cause of action; there has been no act which would be considered negligent or disloyal in the absence of antitrust laws. The *Simon* court, on the other hand, might well find liability for failure of care in unreasonably exposing the company to antitrust

<sup>105</sup> *Clayton v. Farish*, 191 Misc. 136, 153-54, 73 N.Y.S.2d 727, 744-45 (Sup. Ct. 1947).

<sup>106</sup> *Id.* at 137, 73 N.Y.S.2d at 745.

risks. It is perhaps unprofitable, however, to press analysis of a trial court's opinion much beyond the allegations with which it directly deals. The *Clayton* decision is in accord with *Simon* in rejecting a negligence per se approach, in not considering relevant the wide-open "business judgment" approach, and in looking to general standards of good faith and due care as decisive.

### C. Other Cases

There is not a great deal of guidance to be derived from other cases. Those on indemnification,<sup>107</sup> except for several of the earliest<sup>108</sup> decided on grounds which are not relevant to the present problem, turn on interpretations of statutory language or charter or bylaw provisions. Conceivably, some analogical value might be found in cases where the injury to the corporation stems not from an act made illegal by statute but from liability for a tort or breach of contract negligently or intentionally but unjustifiably authorized by directors.<sup>109</sup> But the opinions are so very few and inadequate, in large part because the issue is never squarely presented apart from other questions, as to be of very limited usefulness.

### D. Implications of the Cases

The persuasiveness of the approach of the *Simon* court, however, allows us to pursue its implications further, at least in the many situations in which the application of the antitrust laws is less than perfectly clear. There is no doubt that when directors have exercised reasonable care in evaluating a course of action that promises benefit to a business corporation, they are justified in causing it to take business risks of magnitudes which would not be appropriate to most financial institutions or other fiduciary instrumentalities.<sup>110</sup> Risk-taking is of the essence of business ventures, expected and impliedly

<sup>107</sup> See note 62 *supra*.

<sup>108</sup> *E.g.*, *Du Puy v. Crucible Steel Co. of America*, 288 Fed. 583 (W.D. Pa. 1923); *Hoch v. Duluth Brewing & Malting Co.*, 173 Minn. 374, 217 N.W. 503 (1928). Of course, *Simon* involved indemnification as a subsidiary issue. See note 102 *supra*.

<sup>109</sup> Thus directors have been held liable in a derivative action for damages paid by their company to the victim of a libel committed by them in the course of carrying on the company's business. *Hill v. Murphy*, 212 Mass. 1, 98 N.E. 781 (1912). There is at least a suggestion that a director might be liable to the corporation for negligently causing it to breach a contract. *Cf. J. E. Brulatour, Inc. v. Wilmer & Vincent Corp.*, 63 N.Y.S.2d 54 (Sup. Ct. 1946) (*dictum*).

<sup>110</sup> This principle is most often expressed in the cases as a statement that the standard of care is higher for directors of financial institutions. Note 86 *supra*. The wide scope of the business judgment rule in circumstances where there is no bad faith or self-dealing indicates the high degree of risk allocated to shareholders in business corporations.

agreed to by shareholders—and perhaps other corporate security holders—as a means of securing profits not expected by the beneficiary of a trust fund, for example.

That reasonable risks of antitrust liability are not outside the normal scope of foreseeable business hazards seems clear from the nature of antitrust regulation. It has often been pointed out that the statutes constituting the antitrust laws are not entirely consistent in the philosophies and methods of protection of competition which they implement.<sup>111</sup> An overly cautious view of their applicability might foreclose to a company a considerable range of important and entirely defensible methods of doing business, particularly in distribution. Thus management may be failing properly to perform its function in some cases if it fails to take some degree of antitrust risk.<sup>112</sup> Even as to the broader range of matters in which the statutes present no inconsistencies, the well-known breadth and generality of antitrust prescriptions make it inevitable that even activity in the ordinary course of business presents a quota of antitrust risks. Under these circumstances, it is not unreasonable to assume that shareholders anticipate that over some range the possibility of antitrust litigation is a risk of the enterprise, to be evaluated in the light of other circumstances in accordance with usual standards of business judgment.

But it may be argued appealingly that corporate managers bear responsibilities other than that of operating the company's business as efficiently and profitably as they are able to do in the longrun interests of the shareholders.<sup>113</sup> The directors may be said in some sense to act as trustees for employees, the community at large, or some other group affected by the uses to which the corporation's power or productive capacity is put. Thus they might be held to a higher standard of caution with respect to antitrust violations—or other risks of il-

<sup>111</sup> See, e.g., *Frankfurter, J., in Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953).

<sup>112</sup> Modern cases are increasingly defining directors' duties to extend beyond the traditional negative ones of not taking advantage of their "inside" position or being grossly negligent. See, e.g., *Singer v. Carlisle*, 26 N.Y.S.2d 172, 180 (Sup. Ct. 1940), *aff'd mem.*, 261 App. Div. 897, 26 N.Y.S.2d 320 (1942): "It was the duty of their directors and officers to make every effort consonant with good, honest judgment to obtain for those corporations as much . . . business as possible, and to make this field of activity as profitable as it could be made"; *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 443, 80 S.E.2d 358, 362 (1954): "It is the duty of the management of a corporation to exercise good faith, care, and diligence, to make the property of the corporation produce the largest possible amount . . ." Although such expressions of affirmative duties are becoming more common, the "business judgment" rule will almost always prevent liability from arising.

<sup>113</sup> See, e.g., *Dodd, For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). Compare *Berle, For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). Professor Berle subsequently capitulated to Professor Dodd's thesis. See *BERLE, THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 169 (1954). See also *Gower, Corporate Control: The Battle for the Berkeley*, 68 HARV. L. REV. 1176 (1955).

legality—than would result from measuring their actions against reasonable shareholder expectations. However, although courts have been increasingly willing to support directors in their use of corporate funds for public purposes only indirectly beneficial to the corporation,<sup>114</sup> there has been no indication of a recognition in American jurisprudence of a duty other than to the corporation and its security holders. Furthermore, an approach which placed upon directors legal responsibility for advancing broader social objectives than those established and implemented by legislatures and courts in effect would clothe them with the mantle and discretion of legislators and judges, requiring them to balance conflicting social values in a manner which neither their experience nor manner of selection justifies.<sup>115</sup> Thus it seems clear that in the present state of the law the scope of directors' discretion at the margins of social policy—where there exist risks of illegality—is properly defined by a duty to use due care and sound judgment with respect to the longrun interests of the company. The directors' actions in *Simon* clearly fall within this range, while those alleged in *Clayton v. Farish* equally clearly do not, and the holdings in both cases are in accord with this analysis.

On the other hand, in a situation to which per se illegality attaches or in which for other reasons a law violation is perfectly clear, the present state of the law as to directors' responsibility, at least on first examination, seems unambiguous. The scope of directors' discretion permitted by the "business judgment" rule, or any other measure of directors' duty of care, appears to end at the borderline of clear illegality.<sup>116</sup> The charter of the corporation constitutes an *inter sese* contract among shareholders in which the state is also to some degree a party with interests it may enforce. The charter necessarily incorporates, usually impliedly, the existing law bearing upon the corporation's affairs. This body of law, as subsequently altered by the legislature or courts in the exercise of the state's "reserve power," defines the limit of the discretion which the shareholders may be assumed to authorize the directors to exercise.<sup>117</sup> Shareholders cannot be assumed to agree to bear the risk of director action which intentionally or negligently places the corporation in violation of law. Such risks are outside the scope of the venture as set by the charter. Therefore,

<sup>114</sup> See generally STEVENS, CORPORATIONS § 54 (2d ed. 1949).

<sup>115</sup> See Katz, *Responsibility and the Modern Corporation*, 3 J. LAW & ECON. 75 (1960). See also Rostow, *To Whom and for What End Is Corporate Management Responsible?*, in THE CORPORATION IN MODERN SOCIETY 46, 64-69 (Mason ed. 1960).

<sup>116</sup> See pp. 160-62 *supra*.

<sup>117</sup> This analysis stems essentially from the *Dartmouth College* case, 17 U.S. (4 Wheat.) 518 (1819), and provides the rationale as to director liability in, e.g., *Southern Counties Thrift Co. v. Rairdon*, 47 Cal. App. 2d 770, 118 P.2d 828 (Dist. Ct. App. 1941).

directors who intentionally or negligently chart an illegal course for the corporation act outside their delegated powers and at their own risk.

The apparent certainty on this point is because it is founded on a basic principle: that a person whose responsibility to act for others derives from a legal relationship, rather than an entirely volitional one, must be assumed to act within the rules of the system which provides his authority. For such a creature of law as the "reasonably prudent man"—the director-fiduciary, in this case—to be permitted to involve others by acts contrary to law seems to entail an inconsistency so basic as to threaten the integrity of the legal system. Thus the courts, in their role as guardian of that system, may find it imperative to insist upon strict standards even in situations in which the community might be more lenient.

It may be urged, however, that courts today are increasingly willing to rule that a defendant's intentional violation of law is only one element to be considered in determining whether he should bear tort liability.<sup>118</sup> Thus the ordinary prudence of the law's "reasonable man" may permit or even require action violating a statute. But in these situations, the immediacy of danger of irreparable harm to the most fundamental of values—life and limb or specific property—creates at most a momentary privilege. So necessary an exception in no way erodes confidence in the soundness of the legal rules or the integrity of the system. Indeed, sound statutory interpretation may require that action under these circumstances not be regarded as a violation of law.<sup>119</sup> But in business affairs, where the values threatened by emergencies are at least a degree less fundamental and where predictability and confidence in the rules are of the greatest importance, such an interpretation is much less likely. It is perhaps possible, however, to construct a hypothetical case which at least presents a question.

### *E. A Problem in Competing Values*

Assume that a community has on its books an ordinance requiring that all shops of a certain class remain closed on Saturdays. The only penalty provided is a fine of \$50 against the offending business for each violation. The sole business of Company *A* is the operation of shops which fall within the ordinance's classification. Competition has become very intense and *A*'s competitors have taken to remaining open

<sup>118</sup> Cf. 2 HARPER & JAMES, TORTS § 17.6, at 1013-14 (1956).

<sup>119</sup> The draftsmen of the Model Penal Code recognize "justification" of conduct otherwise criminal in limited classes of special situations as a desirable general principle of interpretation of the law of the offense. See MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, 1958).

on Saturday, in this way attracting enough of *A*'s former clientele that *A*'s business can no longer be operated profitably. *A*'s directors are convinced that the business can be made profitable only by following suit in competing for the rich Saturday market. They determine that even if the maximum fines were regularly incurred, the margin would be enough to assure profitable operations. Furthermore, to their knowledge there have been no prosecutions under the ordinance. Then, for the moment, let us add a finishing touch: the major shareholder is a worthy charity whose income is primarily derived from the corporation's dividends. On these highly "loaded" facts, even a purely business purpose might be thought by most of the community to justify intentional violation of the ordinance.<sup>120</sup> Others, however, would surely be deeply shocked at the suggestion. But even apart from the interesting damages question,<sup>121</sup> probably few would feel that the director should be liable to the corporation for resulting fines. Some might urge that the directors' duty to the corporation *required* that they ignore the ordinance.

Before carrying the discussion further, a second hypothetical case may be considered, different from the first only in that the ordinance provides, in addition, that persons combining or conspiring to bring about a violation are subject to criminal sanctions. Thus directors as well as the corporation could be prosecuted—as is, of course, the case with respect to many antitrust violations. Reflection on these two cases yields some observations and tentative conclusions.

First, at least in the second hypothetical case, there are three legal relationships which must be distinguished—the statutory mandates and penalties directed, first, to the corporation and, second, to the director, and finally, the common-law duty of director to corporation. The latter need not in principle be coextensive with either of the former, although it seems clear that in the second case there can be no legal duty for a director to proceed at personal jeopardy to himself. Probably there is no affirmative legal duty to proceed in the first case either. The question is whether there is an inflexible duty not to proceed.

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<sup>120</sup> The hypothetical case may be contrasted with *Roth v. Robertson*, 64 Misc. 343, 118 N.Y. Supp. 351 (Sup. Ct. 1909), a suit in which recovery was sought from an officer of an amount which he had paid out of corporate funds "to silence opposition" to the corporation's operating its amusement park on Sundays in violation of the "Sunday laws" of the state. The payment was held to be an illegal expenditure, rather than simply *ultra vires*, thus not subject to ratification, even though the complaining shareholder had acquiesced. One possibly important difference from the suggested hypothetical case is that the act of payment, apparently a bribe to public officials, was in itself, apart from staying open on Sundays, contrary to public policy.

<sup>121</sup> Are there recoverable damages when the act resulting in a fine produces a net profit to the company? *Roth v. Robinson*, *supra* note 119, allows recovery without considering the problem. The question could be important, though doubtless embarrassing to the corporation, in the antitrust context.

Second, regardless of community attitude, once a proceeding against the company—and in the second case, the director—is brought before the courts, its outcome is determined by the clear applicability of an unambiguous statutory provision. It is to be noted, however, that the community's decision whether and how to proceed permits great flexibility, even where the violation is clear. The question is raised whether the standard of duty of director to corporation should be less subject to the moderating forces of community attitude than the statutory provision which creates the liability.<sup>122</sup>

Third, if there is to be a moderating force operating to protect directors from liability to the corporation in this situation, it must be introduced by admitting community attitudes into the standard of due care. But it is to be noted that community consensus in such a situation is a very fragile thing. For example, in the hypothetical case, if the action had been taken not to save a failing business but to make a highly lucrative establishment even more profitable, or if competitors were not already ignoring the ordinance, or if the statutory provision were of a different kind—a child labor regulation, for example—any consensus might be lost. But these are factors which do not usually enter into directors' business judgments. The directors' obligation to the corporation would seem to be the same regardless of who the owners are, for example, or whether the business is failing. On the other hand, that the statute has in fact been unenforced, for example, because the community would not tolerate prosecutions under it, would seem to be a relevant factor for director consideration. There are statutes on the books which are not "law" in any operative sense, because they are abandoned as archaic or ill-considered, or because they are expressions of a public morality with which no one expects literal compliance. A later change of community attitudes giving new vigor to such a statute (or judicial doctrine) might not be reasonably foreseeable. Thus to some extent certain manifestations of community attitude, at any rate, may be important in a director's evaluation of a course of conduct, at least as a matter of practical business affairs.

Finally, the second hypothetical case presents a problem worth additional consideration. Assuming that a "live" statutory provision making a director personally liable will effectively eliminate any duty he might otherwise have to the corporation to consider a course of conduct, will it affect his possible liability to the corporation if he is brash enough to persist in seeking to save the company? It might be urged that fairness in this circumstance would prevent recovery—if the

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<sup>122</sup> For a discussion of this problem with respect to the negligence per se doctrine generally, see 2 HARPER & JAMES, *TORTS* § 17.6, at 998-99 (1956).

director handsomely assumes a personal risk to further the corporation's interests, it should not be heard to complain about his exposing it to a similar risk. This argument finds some support in the fact that a common measure of the director's duty is that he take the same care with corporate affairs as he does with his own.<sup>123</sup> On the other hand, it may be urged that the director, freed of any possible duty to act, is a "volunteer," traditionally unprotected by equitable doctrines.<sup>124</sup> Most persuasive, however, is the argument that the additional personal sanction provides a strong warning that the community attaches great importance to compliance and thus makes the director's act more patently negligent towards the corporation.

As has been observed, if there is room for the courts to shield directors from liability to the corporation in cases such as these, it must come from a decision that the ordinarily prudent director will at times appropriately make a judgment about the vitality of some "law-on-the-books" as it bears upon a particular business situation. If respect for the rule of law is to be preserved, it seems doubtful that judges can ever explicitly permit the law's "norm" to evaluate, as a factor in making an acceptable business judgment, the risk of getting caught in a law violation. However, it can perhaps be recognized that if the impact of a law is so arbitrary as to run counter to prevailing community values, a reasonable man might conduct his affairs—or those of a corporation of which he is a director—on the assumption that it will not be applied in a certain case. This will be particularly true where—as in the hypothetical cases—the community's evaluation of the "seriousness" of the offense is low.

#### *F. Community Attitudes Toward the Antitrust Laws*

The foregoing discussion is by no means intended to imply that the antitrust laws, in particular or on the whole, fall into this category. On the contrary, the adherence of Congress and the courts to their objectives has been supplemented in recent years by apparently strong legislative sentiment to strengthen them and by an increasingly vigorous enforcement policy.<sup>125</sup> But it is equally clear that this attitude is far from universal, particularly within the business community. Indeed, the difficulty of the present problem stems in large part from that fact. Many businessmen feel deeply that unmitigated competition is

<sup>123</sup> See note 67 *supra*.

<sup>124</sup> See, e.g., RESTATEMENT, RESTITUTION §2 (1936); SNELL, PRINCIPLES OF EQUITY 112-14 (25th ed. Megarry & Baker 1960).

<sup>125</sup> See, e.g., Bicks, *Statement Before the House Committee on Ways and Means, July 20, 1959, on H.R. 7361 and H.R. 8126*, 4 ANTITRUST BULL. 557 (1959); Hansen, *The Administration of Federal Antitrust Laws*, 4 ANTITRUST BULL. 427 (1959); Loevinger, *Statement Before the A.B.A. Antitrust Section, April 7, 1961*, TRADE REG. REP. 2 (April 14, 1961).



a needlessly destructive and generally unsatisfactory mode of doing business.<sup>126</sup> Some reputable economists join them in questioning the soundness of antitrust as a tool of social control.<sup>127</sup> In wartime and other national emergencies, antitrust enforcement is more often than not curtailed or suspended, presumably as too extravagant a luxury for times of crisis.<sup>128</sup> A substantial part of the economy is protected by regulatory agencies most of which appear to value competition only to a very limited degree, at least in part because Congress has so ordained.<sup>129</sup> Legal counsellors complain that it is difficult to give useful and reliable advice on antitrust matters in part because of the perverse behavior of the enforcement agencies and courts.<sup>130</sup> Some may look the other way, or prepare opinions with cursory attention to facts or precedent, on the apparent belief that one opinion is as good as the next in the antitrust field. Finally, there exists a strong feeling among businessmen that "everyone else is doing it" and that "it" therefore cannot be illegal.<sup>131</sup>

If this is not completely a caricature of a widespread current view of antitrust among businessmen and their advisers, it has troublesome implications. If views of this nature are, or become, dominant in the business community in which directors operate and from which they are largely drawn, do they not inevitably become reflected in the standard of the "ordinary prudent director" which measures the duty of due care and business judgment? If the foregoing reading of the law is correct, the attitude can hardly fail to be reflected in courts' evaluation of how close to the brink of clear illegality directors can permit their corporations to go. Even where illegality seems clear to a dispassionate observer, directors and their counsellors may succeed in finding a ray of doubt in the cases and in the attitudes of enforcement agencies. But is it not "bootstrapping" to permit businessmen's perhaps less than impartial views on the meaning or vitality of the antitrust laws to be reflected in the standard of duty which they

<sup>126</sup> See, e.g., Cameron, *Price-Fixers' Dilemma*, 37 HARV. BUS. BULL., June 1961, pp. 7, 9-10; Smith, *What is the Businessman's Quarrel with the Antitrust Laws?*, 1 ANTITRUST BULL. 261 (1955).

<sup>127</sup> An interesting discussion and references will be found in Hennipman, *Monopoly: Impediment or Stimulus to Economic Progress*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 421 (Chamberlin ed. 1954). See Dewey, *Mergers and Cartels: Some Reservations About Policy*, 51 AM. ECON. REV. 255 (1961).

<sup>128</sup> Fisher, *Antitrust During National Emergencies* (pts. 1-2), 40 MICH. L. REV. 969, 1161 (1942).

<sup>129</sup> See Levi, *Section 7 of the Clayton Act and the Regulated Industries*, 1959 ANTITRUST L. SYM. 136; von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

<sup>130</sup> See, e.g., Van Cise, *Problems and Procedures of Counsel in Advising on Compliance with the Antitrust Laws*, 5 ANTITRUST BULL. 221 (1960). Compare Rashid, *What is Right with Antitrust?*, 5 ANTITRUST BULL. 5 (1960).

<sup>131</sup> Cameron, *supra* note 126, at 8.

owe their corporation and its shareholders? On the other hand, how could this be avoided? No one would suggest that the appropriate norm should be the "ordinarily prudent" judge, or lawyer, or economist.

The dominant judgments of the business community do not, however, provide the sole content of the standard. Earlier analysis has indicated that it is the reasonable expectations of the shareholders—and perhaps other security holders—with respect to the risks the business will be taking, which must define the ultimate limits of director authority. In most corporations security holders may be assumed to be a more representative cross section of the community at large than are the managers. They are likely to retain a less specialized view of the social utility and vitality of competition and the antitrust laws. They may be expected to share with management an understanding that the longrun interests of the company require suitably functioning legal institutions, and that these, in turn, require community respect for the rule of law. Free markets and private ownership of vast corporate establishments can function only if all who participate in the system can confidently assume that each will operate within the clearly defined and effectively enforced rules of the game devised by legislatures and courts. Will courts hesitate to rule that it is not ordinary prudence to expose shareholders to substantial risks of loss from actions which run counter to such basic tenets? Even though the courts necessarily and properly look to the business community to supply most of the content of the formulations of directors' duties, the basic conception of the charter as the ultimate source of corporate authority permits—indeed, requires—that a broader view of public policy determine the outer margins of director discretion.<sup>132</sup>

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<sup>132</sup> The suggested analysis presses beyond what the courts have had to work out to decide the kinds of director liability cases which have so far come before them. However, at least two fundamentally important cases bearing upon the limits of directors' discretion provide perhaps some support. *Abrams v. Allen*, 297 N.Y. 52, 74 N.E.2d 305 (1947), was a derivative action seeking damages from directors who acquiesced in management's plan, unlawful under the National Labor Relations Act, to intimidate striking employees by dismantling plants and removing operations to another locale. It was alleged that these acts were not within the scope of reasonable business judgment but were done solely to carry out, at great cost to the company, an antilabor campaign. Reversing a decision to grant a motion to dismiss, the court of appeals held that the allegations constituted a cause of action. In *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919), a program of withholding dividends for purposes of expansion, increasing employment, and reducing auto prices (in the face of existing demand greater than could foreseeably be supplied even at the higher price) was held to be contrary to the reasonable expectations of shareholders, and the company was required to declare a dividend rather than carry out the program. In their broadest interpretations, these cases may mean that controlling directors are not to be permitted to impose upon other shareholders their views of social organization or other values which, commendable or not, depart fundamentally from those held by the community at large, upon which shareholders have a right to base their expectations. Of the many discussions of these cases, the most useful is Comment, 15 U. CHI. L. REV. 423 (1948).

*G. Toward a Rationale*

By way of summary and conclusion, what more specific guiding standards flow from the foregoing analysis? Are directors sufficiently protected from possible crushing liability? Does this analysis provide sufficient protection to the corporation and its shareholders and enough bite to implement policy favoring antitrust compliance?

First, where there is no reasonable doubt as to the illegality of a proposed course of conduct and it is clear that law-in-action does not drastically depart from the law-on-the-books—as has in recent years been the case with regard to per se offenses, intentionally predatory acts, and conduct grossly impairing competition—authorization by directors, either express or tacit, would seem to be at their own risk.<sup>133</sup> It is not a permissible exercise of business judgment to decide that the risk of being detected or prosecuted is sufficiently small, or exposure to treble damage liability sufficiently limited, that commercial considerations outweigh them. Shareholders have not subscribed to a gambling venture. Clear and unambiguous legal proscriptions provide the minimum rules within which participants in the venture may be presumed to share business risks and profits.

Beyond this relatively narrow range, the usual business judgment rule should prevail. Certainly where there is little, if any, direct precedent to indicate illegality at the time a course is set—as for example, at present, simple, unadorned oligopoly pricing—a later decision should not produce liability, even if the decision “demonstrates” that its result has been the law all along.<sup>134</sup> Where there is some close precedent to indicate illegality, but other precedent, or well-reasoned analysis, which rejects that outcome, the course of action should not necessarily be foreclosed.<sup>135</sup> The same is the case in a situation where a possible judicial or statutory basis for an argument of illegality has, for sound reasons, never been pressed or has remained dormant for a considerable period,<sup>136</sup> or even, in some circumstances, where the FTC or Department of Justice has indicated its disapproval of a prac-

<sup>133</sup> See pp. 170-71 *supra*.

<sup>134</sup> The cases seem uniformly to hold that directors' exercise of judgment should be measured by the conditions at the time the decision was made, not with the benefit of hindsight. See, e.g., *Bailey v. Babcock*, 241 Fed. 501, 514 (W.D. Pa. 1915); *Blaustein v. Pan American Petroleum & Transp. Co.*, 293 N.Y. 281, 304, 56 N.E.2d 705, 715 (1944).

<sup>135</sup> Reliance on opinion of independent counsel will usually suffice, although directors are expected to use such opinion honestly and to review its analysis and conclusions in the light of their own knowledge and experience. See, e.g., *Spirt v. Bechtel*, 232 F.2d 241 (2d Cir. 1956); *Bailey v. Babcock*, *supra* note 134, at 514; *Blaustein v. Pan American Petroleum & Transp. Co.*, *supra* note 134, at 299-300, 56 N.E.2d at 713; *Uffelman v. Boillin*, 19 Tenn. App. 1, 40, 82 S.W.2d 545, 568 (1935). See also Annot., 3 A.L.R.2d 617, 625 (1949).

<sup>136</sup> An excellent example is the apparently definitive Supreme Court pronouncement in *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945), and *FTC v. A. E.*

tice or proposed course of action, but where well-reasoned analysis indicates that the courts are likely not to sustain that position.<sup>137</sup> More generally, where there are reasonable and substantial grounds to believe that the legality of a practice can be sustained or that, for policy reasons, it will not be challenged, directors should be free to use their judgment. That this area of discretion should extend to all but clearly determined matters is indicated by the legally recognized responsibility of directors to maximize corporate profits by assuming reasonable business risks.<sup>138</sup> This does not mean, of course, that shareholder protection has terminated. Exercise of business judgment on a matter of this sort will ordinarily require that one or more independent legal opinions be obtained and independently evaluated by the directors,<sup>139</sup> that the anticipated advantage of the proposal be weighed against the possible antitrust risks, that alternative courses of conduct be evaluated in a similar manner and rejected, and that the final decision not be so patently wrong as to constitute gross negligence. If these standards have been met, however, there should be no director liability for mere errors of judgment.<sup>140</sup>

In addition to these conclusions, one general observation is suggested by the foregoing analysis. Insofar as antitrust issues are analyzed in terms of a rule of reason rather than on a more arbitrary statutory or case law basis, potential director liability as a force for antitrust compliance tends to diminish. In very few, if any, rule of reason situations would a board of directors face any very serious risk of liability in deciding to proceed, provided only that the question has been given informed consideration. If directors are to risk the highly burdensome sanction of financial redress to the corporation, it is up to the courts and legislature to provide a higher degree of predictability as to antitrust legality than has often been available in the past.

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Staley Mfg. Co., 324 U.S. 746 (1945), that price discrimination under the Robinson-Patman Act includes sales producing different "mill net returns," an interpretation which, though sought by the FTC, has since not been pressed with respect to common current pricing practices. See discussion in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 179-85, 209-21 (1955).

<sup>137</sup> See note 135 *supra*.

<sup>138</sup> See note 112 *supra*.

<sup>139</sup> See note 135 *supra*.

<sup>140</sup> See note 70 *supra*.